NO. 21615

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT S. McNAMARA, SECRETARY OF DEFENSE, WALTER T. SKALLERUP, JR., DEPUTY ASSISTANT SECRETARY OF DEFENSE,

Appellants,

v.

JOSEPH J. REMENYI,

Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' OPENING BRIEF

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Assistant Attorney General,

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Central District of California,

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Central District of California ordering that appellee be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force (R. 254-255). Jurisdiction below was founded upon 5 U.S.C. 1009 and 28 U.S.C. 2201-2202 (R. 2). Jurisdiction of this appeal is conferred by 28 U.S.C. 1291.

The complaint, filed by appellee below, was filed

subsequent to a final determination by the Department of Defense that the granting of authorization to appellee for access to classified information was not clearly consistent with the national interest (R. 68, 4). The complaint attacks this denial of access to classified information on the grounds, inter alia, that the procedures followed were unauthorized by statute or regulation, that the procedures were violative of due process of law, and that the appellants had abused their discretion (R. 5-6).

After a hearing, the Court below, by Chief Judge Clarke, issued findings of fact and conclusions of law holding that the procedures followed were conducted in an arbitrary manner and did not conform to the requirements of due process, and that the determination that access authorization to appellee for classified information was not in the national interest, was arbitrary and an abuse of discretion. The Court also made the finding that "the granting of access authorization to [appellee] for information classified at the Secret level is clearly consistent with the national interests" (R. 184-189).

On the basis of these findings, the Court, on August 15, 1966, issued its judgment which ordered, inter alia, that "[appellee] be granted access authorization to information classified as Secret" and which remanded the matter to the proper administrative board of the Department of Defense "for further proceedings in conformity with this judgment" (R. 254-255).

Appellants filed a motion to alter or amend the Judgment and Findings of Fact and Conclusions of Law seeking to strike that

part of the Court's orders which directed that appellee be granted access to classified information, while retaining the order remanding the matter to the administrative board for further proceeding in accordance with the Court's findings. This motion was denied (R. 257) and this appeal followed. 1/

STATEMENT OF THE CASE

This case arises under the Industrial Personnel Security Program administered by the Department of Defense pursuant to the provisions of Executive Order 10865, 25 Fed. Reg. 1583 and Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" dated July 28, 1960. 2/ Appellee, the plaintiff below, was employed by the Rocketdyne Division of North American Aviation, Inc. at Canoga Park, California and, as a result of such employment, he was required to have clearance for access to information classified as "secret" in accordance with Executive Order 10501, 18 Fed. Reg.

1/ The operation of the judgment has been stayed pending final disposition by this Court (R. 279-280).

2/ The pertinent portions of E.O. 10865 and Directive 5220.6 are set forth as Appendix I, infra.
Directive 5220.6 was superseded on January 7, 1967 by a new directive carrying the same number dated December 7, 1966. The provisions of the earlier regulation were in effect during the periods with which we are here concerned. Moreover, the changes so far as the procedures giving rise to the present case are concerned, are changes of form and terminology rather than of substance. Therefore, unless otherwise noted, reference is to the provisions of the Directive dated July 28, 1960 and set forth in the Appendix.

7049. [3] Appellee applied for a "Secret" clearance on or about February 1959. On November 12, 1963, the Department of Defense notified appellee and his employee that any authorization appellee possessed for access to classified information was suspended. The notice stated that the screening Board had concluded that the information available to it did not warrant granting appellee a "Secret" clearance and, that, pending final disposition of his case, access was not authorized at any level (R. 11-13). As a result of such suspension, appellee's employee terminated his employment (R. 185-186; 363).

The suspension was directed by the Industrial Personnel Access Authorization Screening Board of the Department of Defense in accordance with the provisions of Directive 5220.6 and, as required by that Directive, the Screening Board issued at the time of the notice a "Statement of Reasons" informing appellee of the grounds upon which his security clearance would be denied or

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3/ E.O. 10501, pertinent portions of which are set forth in App. I, infra, is the basic document exercising the President's authority to protect national defense information against unauthorized disclosure. It provides for three catagories of national defense information which are, in desending order, "Top Secret"; "Secret" and "Confidential". "Secret" is defined as "defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations".

revoked (R. 14-16; 312-315). [4] Appellee filed an answer to the Statement of Reasons and requested, as provided for by the applicable procedures, a personal appearance hearing before an Industrial Personnel Access Authorization Field Board. The case was referred to the Los Angeles Field Board for a hearing (R. 312).

The procedures for such hearings are prescribed by the Directive in Section IV, E., and such procedures include the direction that an applicant be afforded the opportunity to cross-examine witnesses, see Section IV, E, 2, (b). However, the directive also provides for a certification procedure permitting the introduction of witnesses testimony without confrontation and cross-examination under limited and specified circumstances when such circumstances are found to exist by the Secretary of Defense, see Section V, E, 2(f). This procedure is authorized by E.O. 10865, Section 4.

The Defense Department's chief witness, unidentified in

4/ The Statement of Reasons included, inter alia, that appellee had had contact, during 1948 and 1949, with the Chief of the Czechoslovakian Intelligence Service in Vienna, Austria, that appellee, in 1945, forged documents which falsely stated that he had been a political prisoner of the Nazis and used such false documents in an application for Austrian citizenship, and that appellee, in interviews with the Air Force in 1960, had, under oath, testified falsely concerning these activities. These "Reasons" were found to be true by the Field Examiner, who conducted appellee's hearing as described above, upon consideration (R. 312-315) and reconsideration (R. 300-301), and by the administrative appellate body within the Department of Defense, the Central Industrial Personnel Access Authorization Board (R. 303-304, 308-309). Both the Field Examiner and the Central Board found appellee, in view of his character, an individual who would act contrary to the national interest (R. 315, 301, 310).

the Record, is a person, now a citizen of the United States, who refused to testify in the presence of the appellee or under conditions where his true identity would be disclosed to appellee. The witness based his refusal on the fear that he would otherwise jeopardize the safety of certain close relatives still residing in Czechoslovakia (R. 68-69; 304-305; 292). The witness would agree to testify and submit to cross-examination by appellee's attorneys so long as his true identity was concealed from appellee. Appellee and appellee's counsel agreed to this procedure. 5/ Arrangements were therefore made to take the witnesses' testimony in the presence of the Field Examiner, but, during the taking of such testimony, it became apparent that the elicited testimony would lead to identification of the witness by appellee and the examination was continued outside the presence of the Examiner. The testimony of the witness was then set forth in summary or conclusory form in a stipulation signed by both counsel for appellee and counsel for the Department of Defense and the stipulation was entered into evidence at the hearing (R. 291; 305-306; and see Stipulation and the letter of appellee's counsel dated February 6, 1964 set out in

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5/ As noted below, appellee's counsel subsequently claimed that this agreement had been coerced by counsel for Department of Defense who informed the appellee's counsel that if an agreement could not be reached to obtain this testimony, a resort could be made to the certification procedures of E. O. 10865 and Directive 5220. 6 permitting the Secretary of Defense to certify to the statement of a witness whose identity can not be disclosed for "good and sufficient" cause, thus eliminating any confrontation whatsoever (See Section 4 of E. O. 10865, and paragraph IV,E, 2(f) of Directive 5220. 6. Appendix I, infra and (R. 68-70; 306, 300).

Appendix II, infra). [6]

The Field Examiner subsequently issued his report which set forth his findings concerning the information alleged in the Statement of Reasons and which concluded that "it would not be clearly consistent with the national interest to grant [appellee] access authorization to classified information at any level" (R. 312-324). Pursuant to the applicable provisions of Directive 522.6 this Report was forwarded to the Central Industrial Personnel Access Authorization Board for final determination. The Central Board tentatively decided to make the same finding as the Field Examiner and, as required by the Directive, appellee was offered an opportunity of an appearance before the Board, which was requested and at which appellee appeared through his counsel. At the outset of the Central Board proceeding, counsel for the Department of Defense and for appellee advised they had agreed, subject to the Board's approval, to reopen the record to permit further examination of the unidentified witness. [7] The Board's approval was given (R. 304-305).

Subsequently, additional evidence, including a fifty page

6/ The Stipulation and letter were, of course, part of the record in the court below.

7/ Appellee claimed, and the Court below found, that the Department of Defense counsel contacted the members of the Central Board outside the presence of appellee's counsel and without counsel's consent (R. 5, 187). The answer of the appellant's below was that the only such contact occurred when Department Counsel approached the Central Board to advise them of the agreement between counsel concerning reopening the record and that this contact was with the knowledge and consent of the appellee's counsel (R. 75).

deposition of the unidentified witnesses testimony on cross-examination, was submitted to the Field Examiner, for consideration and the Field Examiner forwarded a "Supplemental Field Board Report" (R. 290-301) to the Central Board, once again concluding that it was not "clearly consistent with the national interest to grant [appellee] access authorization to classified information at any level" (R. 399-301). After consideration by the Board, including the filing of a brief by appellee in lieu of an offered opportunity for a further personal appearance before the Board (R. 303, 305-307). The Central Board issued its final determination [8/] "that the granting of authorization to [appellee] for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest" (R. 310), and this suit followed.

After hearing, the court below issued findings of fact in which it found (R. 186-187) that the hearing proceedings and the Central Board determination were "arbitrary and failed to conform to the requirements of due process because of the following facts:

a. [Appellee] was not permitted to confront the witness testifying against him nor to know the witness' identity;

b. The transcript of the personal appearance proceedings held February 12, 1964, was

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8/ Directive 5220.6, paragraph I (3), provides that, with specified exceptions not here applicable, the Central Boards' determination shall be final.

destroyed without authority and there no longer is any record of that portion of the proceedings;

c. Counsel representing [appellants] improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of [appellee] or [appellee's] counsel and without consent on the part of [appellee] or [appellee's] counsel;

d. Evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board; . . . ." 9/

The "findings of fact" also included the district court's finding that the unidentified witness' "testimony should be expunged

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9/ Appellants, of course, relied, in the court below, on the agreement and stipulations entered into by appellee's counsel concerning the examination of the unidentified witness. As noted above, note 6, supra, appellee's counsel contended that their agreement had been coerced. The destroyed transcript refers to the notes taken at the beginning of the unidentified witnesses examination in the presence of the Field Examiner. As already described, that examination was terminated and the testimony merged into a stipulation. It was the position of the appellants that, on this basis, such destruction was not improper.

As to the improper contact, see note 7, supra. The evidence not properly authenicated apparently refers to letters concerning records of the Austrian Federal Police. Appellant's position below was that use of such evidence is permitted by the applicable regulations and that, since the Examiner stated his decision would not be changed by the exclusion of such evidence (R. 299) their admission, even if in error would not be reversible error.

from the record at the personal appearance proceedings" and that on such record "the granting of access authorization to [appellee] for information classified at the 'secret' level is clearly consistent with the national interests" (R. 188).

The district court then issued its judgment which ordered that the testimony of the unidentified witness and the stipulations referring thereto, be expunged from the administrative record (R. 254-255). The judgment also ordered (R. 255):

> "That [appellee] be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force; . . . ."

As described in the Jurisdictional Statement, appellants' filed a motion to amend this latter portion of the court's judgment and, upon denial of the motion, this appeal followed.

QUESTION PRESENTED

Whether the District Court had authority and jurisdiction to order that appellee be granted access to information classified as secret by the United States Army, Navy and Air Force.

ARGUMENT

I

THE DISTRICT COURT LACKED AUTHORITY AND JURISDICTION TO ORDER THAT APPELLEE BE GRANTED ACCESS TO CLASSIFIED INFORMATION.

A. Introduction

In Greene v. McElroy, 360 U.S. 474, the Supreme Court decided that the particular procedures followed in denying the petitioner access to classified information had not been authorized and decided the case on the narrow ground of lack of authorization, 360 U.S. at 493, 508. In reaching its decision, the Court declined to consider the difficult and far-reaching Constitutional questions concerning whether or not procedural due process requirements are applicable to administrative hearings culminating in the denial of a security clearance and, if so, whether confrontation would be constitutionally required in such proceedings. 10/ And the Court's holding did not require it to consider the extent of the permissible

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10/ There have been lower court decisions answering both these questions in the negative, holding that the government's power to exclude individuals from classified information is exclusive and absolute and that procedural due process was not applicable, Von Knorr v. Miles, 60 F. Supp. 962, vacated on jurisdictional grounds, but affirmed on this point, 156 F.2d 287 (C.A. 1); or that confrontation was not constitutionally required, see the Court of Appeals' decision in Greene, supra, Greene v. McElroy, 254 F.2d 944, which was, of course, not passed on by the Supreme Court. Cf. Unglesby v. Zimny, 250 F. Supp. 714 and Bailey v. Richardson, 182 F.2d 46 (C.A.D.C.) affirmed by an equally divided court, 341 U.S. 918.

judicial review concerning the application of such procedures.

While the present case potentially involves these issues, the view we take of the case, and the posture in which it comes before this Court avoids the necessity of considering such issues. As noted in the Statement, the applicable regulations, contained in Department of Defense Directive 5220.6, provide for confrontation with an exception being allowed only in those cases in which the Secretary of Defense certifies that the witness cannot appear to testify because disclosure of his identity would be substantially harmful to the national defense or due to other good and sufficient cause (see Statement, supra, p. 5, and Directive, paragraph II, E, 2(f) and E.O. 10865, Section 4 in Appendix I, infra). The certification procedure was not used in the present proceedings and the validity of that procedure and the questions which would be raised by its use are not now before the court. Thus, the only applicable procedures with which the court could be concerned are those providing for confrontation.

That the necessary authority for such procedures exist has already been decided by the Supreme Court, Greene v. McElroy, supra, 360 U.S. at 506; Cf. Ogden v. United States, 303 F. 2d 724 (C.A. 9), cert. denied 376 U.S. 973. But, it is equally clear that the extent of confrontation granted by the regulations was not provided the appellee in the present case. If appellee was not provided the full procedures required by the regulations and had not waived those procedures the administrative action was invalid, Vitarelli v. Seaton, 359 U.S. 535.

Our position below, of course, was that the granted right of confrontation had been waived. Such a waiver, if voluntary, would be valid, Williams v. Zuckert, 371 U.S. 531 and 372 U.S. 765. As we read the district court's decision, particularly in view of the allegations of the complaint (R. 4) that the waiver was compelled, it is that the waiver was involuntary and thus invalid, and that, therefore, the procedures actually followed were invalid. 11/ Since such a finding rests on a factual determination by the court below, we have not appealed from such findings.

In brief, then, as we read the district court's findings, the district court held only that the administrative action in this case was invalid and the holding was based on the facts of this case, the district court did not invalidate the procedures provided for by the applicable regulations, nor pass upon the issue of whether non-confrontation, if achieved pursuant to the certification procedure provided for by the regulations, would be constitutionally valid. The case as it is before the Court thus avoids the issues which the Supreme Court failed to decide in Greene v. McElroy, supra.

However, the order issued by the district court on the basis of its findings reaches a result which the Supreme Court not only did not reach in Greene v. McElroy, supra, but one which

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11/ As noted in the Statement, supra, the District Court also made findings involving other aspects of the proceedings below-concerning the destruction of the reporter's notes, alleged improper contacts with the Central Board, and the receipt of evidence-but these too relate to the proceedings in this case, rather than the proceedings prescribed by the applicable Executive Orders and regulations.

Mr. Justice Harlan felt it necessary to preclude when, in his special concurring opinion, he stated "and certainly there is nothing in the Court's opinion which suggests that petitioner must be given access to classified material". 360 U.S. at 510. The district court's order here imposes just such a requirement for, as noted in the Statement, it ordered (R. 255):

> "2. That [appellee] be granted access authorization to information classified as Secret. . . ."

This drastic judicial order - totally unprecedented - will result in the forced disclosure of classified information by the Executive. We submit that the district court lacked the authority and jurisdiction to so order.

B. Control Over Military Secrets is an Executive Function Which Has Never Been, and Should Not Be, Subjected to Judicial Control.

The authority and responsibility for the protection of official information affecting the national security is granted and delegated by Executive Order 10501, 18 Fed. Reg. 7049 (Appendix I, infra). As this Court stated in Ogden v. United States, supra, 303 F. 2d 724 at 729 describing E. O. 10501 (emphasis added):

> . . . This Presidential Order established a comprehensive program for the classification, marking, custody, dissemination, and transmission of official information relating to the national defense.

The Order directed departments and agencies having direct responsibility for the national defense to classify such material and control its subsequent dissemination in accordance with the standards and procedures stated in the order. The Order made it clear that classified material was to be made available only to "authorized persons, in or out of federal service," [§ 5(i)] and that it was the duty of the Department involved to see that "unauthorized persons are prevented from gaining access thereto," [§ 6] as the Order stated, "by sight or sound." [§ 6(e)] More specifically, the Order directed that "knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy," [§ 7] and that "classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department * * * [§ 7(b)]

The second Presidential Order here relevant, Executive Order 10865, 25 Fed. Reg. 1583, restates the authority and responsibility of the Executive Department heads to protect classified information and directs them to issue regulations protecting

the release of classified information within industry, E.O. 10865, § 1(a). As we have just noted, E.O. 10501 directs that classified information be disseminated only to those individuals "determined to be trustworthy" (§ 7). E.O. 10865 directs that authorization for access to classified information "may be granted by the head of a department or his designee" to an individual "only upon a finding that it is clearly consistent with the national interest to do so" (§ 2). E.O. 10865 also provides that "[n]othing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access . . . if the security of the nation so requires." (§ 9)

In short, the power and responsibility to protect classified information flows from the power and responsibility of the President and has been granted and delegated to the heads of the executive departments. The power of the executive department to control, in the internal operations of the executive branch, the dissemination of classified defense information in its custody is peculiarly an executive function. For reasons implicit in the constitutional separation of powers, the courts have traditionally refused to intervene in the conduct by the Government of its internal affairs. These are matters which have wisely been left to the discretion of the executive and to correction, if necessary, by political processes. As the Supreme Court long ago recognized, and has frequently repeated, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief,

and we are quite satisfied that such a power was never intended to be given to them". Decatur v. Paulding, 14 Pet. 497, 516.

The judgment of the court below - ordering the executive to grant an individual access to classified information - attempts to subject the plenary power of the executive to control the dissemination of military secrets in the course of executive operations to judicial control. Such control would, we submit, seriously impinge upon the necessary powers, and responsibility, of the executive to protect information vital to the national security and take onto the courts an authority and a responsibility they have never assumed. Such control would, we further submit, do violence to the fundamental doctrine of the separation of powers.

The district court's attempt at judicial control of this executive power is not only totally unprecedented, it is control that has been consistently disowned by the courts themselves. In reaching its holding in Greene v. McElroy, supra, the Supreme Court left undisturbed the fundamental conclusion of the Court of Appeals for the District of Columbia Circuit, which held that the decision as to who is entitled to access to classified information must be made, not by the judiciary, but by the executive. The Court stated (254 F. 2d 944 at 954; emphasis added):

> In a mature democracy, choices such as this must be made by the executive branch, and not by the judicial. If too many mistakes are made, the electorate will in due time reflect its dissatisfaction with the results achieved. It would be an unwarranted

> interference with the responsibility which the executive alone should bear, were the judiciary to determine for itself whether Greene or any other individual similarly situated is in fact sufficiently trustworthy to be entitled to security clearance for a particular project.

In reaching this conclusion, the Court of Appeals was merely reaffirming its statement in the earlier case of Vitarelli v. Seaton, 253 F. 2d 338, reversed on other grounds, 359 U. S. 535 that "[i]t is not our function to decide whether appellant was or was not untrustworthy, or a 'security risk'." (253 F. 2d at 343). Cf., Von Knorr v. Miles, supra, 60 F. Supp. at 971. And, we have already referred to Mr. Justice Harlan's concurring opinion in Greene v. McElroy, supra, in which he sought to make clear that there was "nothing in the Court's opinion which suggests that petitioner must be given access to classified material" (360 U. S. at 510).

The executive power perhaps most closely analogous to that involved here is the power of removal of government employees. The interest of the government in denying access to military secrets to individuals whom executive department heads find untrustworthy is directly comparable to the government's interest in employing only individuals in whom it has trust and confidence. In cases challenging the validity of administrative dismissals of government employees, the courts have refused to go beyond a determination

that any procedural or substantive rights granted by Executive Order or by statute have been complied with, 12/ the courts have refused to exercise judgment over who should be hired or retained. That history was canvassed in detail in the opinion of the court of appeals in Bailey v. Richardson, 182 F. 2d 46 (C. A. D. C.), affirmed by an equally divided Court, 341 U. S. 918, upholding the constitutionality of the dismissal of government employees on loyalty grounds without confrontation of witnesses, and need not be repeated here. The Court of Appeals stated (182 F. 2d at 62):

> "The judiciary cannot assume the responsibility for the sufficiency of the qualifications of executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power.
>
> * * * *
>
> It is inescapable from the Constitution's separation of powers that the qualification and disqualification of executive employees is for executive determination. . . ."

And Cf., Beard v. Stahr, 200 F. Supp. 706, 773 (D. C. D. C.), vacated on other grounds, 370 U. S. 41. And see this Court's recent opinion in Mancilla v. United States, et al., ___ F. 2d ___ (C. A. 9, 1967)

12/ Subject, of course, to the requirement that the statutory grounds for dismissal may not be patently arbitrary or discriminatory. There was no finding here, nor could there be, that the standards for denial of access imposed by E. O. 10501 and E. O. 10865 and implemented in Directive 5220. 6 were arbitrary or discriminatory.

No. 21,173, July 28, 1967. [13]

What is true of the executive's power over its employees is true with redoubled force of the power to say which private persons may have access to secret military information, for here we are dealing with the most vital interests of the nation. In no area is the constitutional responsibility of the executive branch any greater or any clearer; if any powers of the executive are to remain free of judicial control, they must surely include the power to exercise ultimate control of classified defense information.

Moreover, the order of the court below, if allowed to stand, would not only constitute undue interference with the executive's responsibility for the protection of information relating to the national security and violate the separation of powers doctrine, the judicial control it attempts would inevitably involve the courts in passing judgment on the executive's appraisal of the requirements of the national security, a function which the courts are ill-equipped to perform. The resolution of the question of whether an individual's access to classified information is "clearly consistent with the national interest", the standard imposed by E.O. 10865, requires, we submit, knowledge and background of a kind not

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13/ Another line of cases applicable by analogy are those in which classified information is sought in civil actions between private parties. The courts have refused to direct the disclosure of classified information despite the resulting effect on the rights of private parties, see Reynolds v. United States, 345 U.S. 1; Pollen v. Ford Instrument Co., 26 F. Supp. 583 (D.C.E.D.NY); Firth Sterling Steel v. Bethlehem Steel, 199 F. Supp. 353 (D.C.E. D.Pa); Cf. Totten v. United States, 92 U.S. (Otto) 105.

normally possessed by the courts and involves an ultimate judgment of a kind which peculiarly must be made by those who bear the responsibility for the wisdom of their judgments. 14/

In Greene v. McElroy, supra, the Court of Appeals pointed out that for the Court to seek to determine the individual's qualification for access would involve (254 F. 2d at 953):

> " . . . judgment remote from the experience and competence of the judiciary. Indeed, any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the government."

And, as already quoted, the Court observed (254 F. 2d at 954):

> In a mature democracy, choices such as this must be made by the executive branch, and not by the judicial. If too many mistakes are made, the electorate will in due time reflect its dissatisfaction with the results achieved. It would be an

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14/ The district court found that "the granting of access authorization to [appellee] for information classified at the Secret level is clearly consistent with the national interest" (R. 188). As we have pointed out, the power and responsibility to make such a determination is an executive function and has been entrusted by the President to the executive department heads. We have argued that such determinations have not been made and should not be made by the courts. If this court, as we submit it should, vacates the district court order and orders a remand of the matter to the proper administrative unit of the Department of Defense, the order should, and by implication must, vacate this finding, whose invalidity rests on the same issue and considerations invalidating the district court's order.

unwarranted interference with the responsibility which the executive alone should bear, were the judiciary to determine for itself whether Greene or any other individual similarly situated is in fact sufficiently trustworthy to be entitled to security clearance for a particular project.

All the foregoing considerations, we submit, conclusively demonstrate that the order of the district court must be vacated. We would note that such a concept is not new or novel, but is deeply routed in our doctrine of the separation of powers and in our constitutional history. We have already referred to the famous remarks made by Mr. Chief Justice Taney over a century ago in Decatur v. Paulding, supra, 14 Pet. at 516, concerning the inadvisability of and the lack of authority for judicial interference with the performance of the duties of the executive department. In Marbury v. Madison, 1 Cranch 137, Chief Justice Marshall stated (1 Cranch at 164):

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. * * * 15/

One final consideration must be raised. The district court's order not only exceeded its jurisdiction, it was not fully in accord with its own findings. As described in the Statement, supra, appellee's access authorization for secret material was denied and

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15/ The rule of law as stated by Chief Justice Marshall, points up the clash of authority which would result if the district court's order were allowed to stand and underscores, we believe, our position that that order violates the separation of powers doctrine. The President had directed the appellants', the Secretary of Defense and his appropriate designee, to permit access only when, in their discretion, such access is clearly consistent with the national interest, but the district court has ordered access not merely in the absence of such a determination but in the face of appellants directly contrary determination. While the court's have jurisdiction to direct the performance of ministerial duties by the executive, Marbury v. Madison, supra, they do not have jurisdiction over executive department heads to compel acts which are in no sense ministerial, State of Mississippi v. Johnson, 71 U.S. 475, 489-90, 498-500.

And we would note that the President, in E.O. 10865 has directed (§ 9) "Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires." And see Greene v. McElroy, supra, 254 F.2d at 953; Von Knorr v. Miles, supra, 60 F. Supp. at 971.

his existing access authorization [16] was suspended, pursuant to the applicable regulations, by the Screening Board (R. 12). Thereafter, appellee availed himself of the further proceedings - a Field Board hearing and appeal to the Central Board - provided for by the regulations. It was these subsequent proceedings which the court's findings invalidated; there was no finding that the Screening Board's action was in any way unauthorized or invalid The continued and unchallenged validity of the Screening Board's action constitutes a viable and valid determination that appellee does not meet the standard for access to classified information at any level, let alone the Secret level, and the Court's order is in direct conflict with its findings. [17]

This case, while raising very serious issues, remains simple in concept. Appellants conducted the proceedings below both on the assumption that the agreement entered into with appellee

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16/ Though not completely clear from the Record, this was apparently at the level of Confidential prior to the Screening Board's action (R. 303).

17/ If we are correct in our arguments that the courts should not undertake to determine whether appellee is sufficiently trustworthy to be entitled to a security clearance and should not seek to control executive discretion by instructing the executive officials who are appellants here or an executive administrative agency to make such a favorable determination, the maximum relief the court should have granted appellee was a remand for further administrative action. In view of the continued validity of the Screening Board's suspension order and since the matter was heard before the Field and Central Boards on the assumption that the agreement entered into by appellants and appellee, now struck down by the court, was valid, we submit it is to the Screening Board that the case should be remanded. The appellee or the appellants may then choose to follow the procedures of the regulations in response to the Screening Boards outstanding suspension order.

and his counsel was valid and on the belief that the agreed upon procedure in fact provided greater protection than would have been provided by resort to other procedures permitted by the regulations (R. 306, 68-70). Admittedly, the agreed upon procedure actually employed did not comply with the applicable regulations. Accepting, as we must since we have not appealed this point, the district court's finding that the agreement was invalid, we readily agree that the procedures followed were then unauthorized and must fall. The proper relief to be granted in such a case is, we submit, to remand the matter to permit further proceedings in accordance with the regulations.

In contrast, the relief granted by the court below is, in substance, a mandatory injunction requiring that the government grant appellee access to defense secrets, 18/ notwithstanding the judgment of the Screening Board that such disclosure was not clearly consistent with the national interest. The court below has

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18/ In an attempt to counteract any lessening of emphasis which may stem from the necessary repetition of the terms classified information and secret information throughout this brief, we again quote E.O. 10501 to describe the type of information to which the district court has ordered access. E.O. 10501, Section 1(b) defines Secret information as:

> . . . defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

in effect sought to compel appellants, executive officers of the Government, to act in opposition to what they believed to be required by vital national interests.

As we have attempted to establish, the fundamental issue in this case is the separation of powers. For over a century and a half the executive has borne the complete responsibility for the preservation of military secrets, accountable to the electorate for both the inadequacy or the excessiveness of security measures. It is particularly appropriate, within the framework of our system of separate powers that the courts refrain from entering such a field, one from which they have abstained for 170 years and which poses issues far different from those traditionally dealt with by the courts.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment below should be vacated insofar as it directs the Secretary of Defense to grant a Secret access authorization to appellee without further administrative proceedings. The matter should be remanded for further administrative proceedings.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ M. Morton Freilich

M. MORTON FREILICH

APPENDIX I

EXECUTIVE ORDER

10501

SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

Section 1. Classification Categories: Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

* * *

(b) Secret: Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments

important to national defense, or information revealing important intelligence operations.

* * *

Section 6. Custody and Safekeeping:

* * *

(e) Custodian's Responsibilities: Custodians of classified defense material shall be responsible for providing the best possible protection and accountability for such material at all times and particularly for securely locking classified material in approved safekeeping equipment whenever it is not in use or under direct supervision of authorized employees. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified defense information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

* * *

Section 7. Accountability and Dissemination: Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classified defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

* * *

(b) Dissemination Outside the Executive Branch: Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

* * *

EXECUTIVE ORDER

10865

SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interests:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1. (a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection

(a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

* * *

SECTION 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless he applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his

designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

* * *

SECTION 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

* * *

SECTION 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

SEAL
DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

July 28, 1960

NUMBER 5220.6

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Industrial Personnel Access Authorization Review Regulation

Reference: (a) DOD Directive 5220.6, entitled "Industrial Personnel Security Review Regulation", dated February 2, 1955, as amended (cancelled)

I. GENERAL

A. Authority

This Regulation is issued pursuant to the authority vested by law, including Executive Order 10865 (reproduced as Appendix A), in the Secretary of Defense.

* * *

B. Purpose

1. The Secretary of Defense and the Administrators of the Federal Aviation Agency, and the National Aeronautics and Space Administration have prescribed specific requirements, restrictions, and other safeguards which they consider necessary to protect (a) releases of classified information to or within United States industry that relate to bids, negotiations, awards, or the performance or termination of contracts with their department or agency, and (b) other releases of classified information to or within industry which their department or agency has responsibility for safeguarding. In this connection, this Regulation prescribes uniform standards, criteria, and procedures for processing to final determination all cases which come within the scope of the Industrial Personnel Access Authorization Review Program.

* * *

3. This Regulation is issued to conform the Industrial Personnel Access Authorization Review Program to the requirements of Executive Order 10865.

C. Definitions

* * *

2. Access Authorization: An authorization to have access to one or more categories of information classified in accordance with Executive Order 10501. (NOTE: Actual access, when authorized, requires both an access authorization and a "need to know".) In the case of a contractor, an "access authorization" is an authorization for the contractor involved to have access to specific categories of classified information provided such access is (a) required in connection with the bidding, negotiation, award, performance or termination of contracts with a Department of Defense agency or activity or (b) required in connection with other releases of classified information to or within industry. In the case of a contractor employee, an "access authorization" is an authorization for the employee to have access to specific categories of classified information provided such access is (1) required for the performance of his work with a particular contractor on contracts with a Department of Defense agency or activity or (2) required in connection with the release of classified information to or within industry.

* * *

5. Applicant: Any person who is eligible to have the matter of granting, revoking, or denying him an access authorization determined or reconsidered under the Industrial Personnel Access Authorization Review Program as provided for in paragraphs I.F. and V.B.

* * *

7. Personal appearance proceeding: A proceeding before the New York, Washington, or Los Angeles Industrial Personnel Access Authorization Field Board convened and conducted in accordance with this Regulation. The use of the terms "personal appearance proceeding" or "proceeding" in this Regulation does not imply, and shall not be construed to mean, that such procedures are subject

to the provisions of the Administrative Procedure Act, or that the rules of evidence customary in the courts of the United States shall be applied.

D. Policy

1. The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available information justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.

2. A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Regulation adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned. A determination under this Regulation favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

* * *

II. STANDARD AND CRITERIA

A. Standard for Issuing an Access Authorization

Authorization for access to classified information of a specific classification category shall be granted or

continued only if it is determined that such access by the applicant is clearly consistent with the national interest.

B. Criteria for Application of Standard in Cases Involving Individuals

1. Commission of any act of sabotage, espionage, treason, or sedition or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.

2. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, revolutionist, or with an espionage agent or other secret representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

3. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

4. Membership in, or affiliation or sympathetic association with, or participation in the activities of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

5. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

6. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

7. Participation in the activities of an organization established as a front for an organization referred to in subparagraph 4., above, under circumstances indicating that his personal views were sympathetic to the subversive purposes of such organization.

8. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or wympathetic to, the infiltrating element or sympathetic to its purposes.

9. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.

10. Sympathetic association with a member, or members, of an organization referred to in subparagraph 4., above.

(Paragraphs 11. through 19. and part of paragraph 20 have been omitted.)

such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relative which may be likely to cause action contrary to the national interest.

21. Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a Congressional or legislative committee, or Federal or State court or other tribunal, regarding charges of his alleged disloyalty or other misconduct.

C. Guidance for the Application of the Standard and Criteria

1. The activities and associations listed in paragraph III. B., above, describe conduct which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access

authorization. The conduct varies in implication, degree of seriousness and significance depending upon all the factors in a particular case. Therefore, the ultimate determination of whether an authorization should be granted or continued must be an over-all common-sense one on the basis of all the information which may properly be considered under this Regulation including but not restricted to such factors, when appropriate, as the following: the seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

2. Legitimate labor activities shall not be considered in determining whether access authorization should be granted or continued.

3. It is essential to the efficient, economical, and equitable operation not only of the Industrial Personnel Access Authorization Review Program, but of the total procedures whereby the Department of Defense authorizes access to classified information, that applicants provide full, frank and truthful answers when they complete official questionnaires or other similar documents, or respond to official inquiries. Accordingly, the deliberate giving of false or misleading testimony or information on relevant matters, may be sufficient standing alone to justify denying or revoking access authorization and shall be weighed carefully before a determination is reached under this Program.

4. The granting or continuing of an authorization for access to a contractor is not clearly consistent with the national interest if the access authorization of an owner, officer, director, or any executive of the contractor who is required to have such an access authorization, has not been, or would not be, granted under the standard and criteria set forth in paragraphs III. A. and III. B., above.

IV. PROCESSING OF CASES

* * *

C. Initial Adjudication Procedures (Screening Board Action)

1. The Screening Board shall review each case referred to it by the Director and shall determine in accordance with the standard and criteria set forth in paragraph III whether the reported information warrants (a) authorizing or continuing to authorize access at the specific classification category requested or (b) further processing as set forth below.

* * *

3. The Screening Board may, with respect to any case pending before it, determine at any time that an existing authorization shall be suspended. Upon any such determination, the Director shall notify the applicant, the contractor, the office of the cognizant military department and the agency or activity which forwarded the case to him.

* * *

5. If the Screening Board concludes on the basis of the information available to it and in accordance with the standard and criteria set forth in paragraph III that the case does not warrant a determination favorable to the applicant, it shall prepare a Statement of Reasons informing the applicant of the grounds upon which his access authorization may be denied or revoked. This Statement of Reasons shall be as comprehensive and detailed as the national security permits. At the time a Statement of Reasons is issued, any access authorization previously granted for Secret or Top Secret shall be suspended or limited to Confidential unless such access authorization was granted pursuant to board action under any industrial personnel review program in which case the Screening Board shall determine whether the access authorization should be suspended or limited. The Screening Board shall also determine whether any access authorization previously granted for

#First amendment (Ch 1, 4/5/63)

Confidential should be suspended or limited.

6. The Director shall forward the Statement of Reasons and a copy of this Regulation to the applicant and shall inform him of the status of his access authorization pending a final determination. An applicant who has been served with a Statement of Reasons and who has filed under oath or affirmation a written reply thereto which complies with the requirements of paragraph IV. C. 7 shall be afforded:

a. An opportunity to appear personally before a Field Board for the purpose of supporting his eligibility for access authorization and of presenting evidence on his own behalf.

b. A reasonable time to prepare for that appearance.

c. An opportunity to be represented by counsel without cost to the Government.

d. The opportunity to cross-examine adverse witnesses prescribed in paragraph IV. E. 2.

* * *

D. Personal Appearance

* * *

3. It is to the advantage of both the applicant and the Department to shorten and simplify the proceedings before the Field Board by stating the issues and arriving at an agreed-upon version of the facts in the case when it is possible to do so. Department counsel is authorized to consult directly with the applicant, or if he has counsel or representative, with them, for purposes of reaching mutual agreement upon arrangements for an expeditious proceeding in the case. Such arrangements may include clarification of issues, and stipulations with respect to testimony and the contents of documents and other physical evidence. Such stipulations when entered into shall be binding upon the applicant and the Department of Defense

for the purpose of these proceedings.

* * *

E. Procedures for Personal Appearance Proceedings

1. General Provisions

* * *

2. Introduction of Information

a. The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Regulation, together with all information submitted by the applicant. The record shall not be limited to evidence admissable in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Regulation and accorded the weight deemed appropriate, but irrelevant, immaterial or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the Field Board. Efforts shall be made to obtain the best evidence available.

b. Unless permitted by paragraphs e. and f., below, the record may contain no information adverse to the applicant on any controverted issue unless (1) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (2) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this paragraph, or by any other provision of this Regulation, may be received

and made part of the record and may be considered by any board or official charged with making determinations under this Regulation.

* * *

f. A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subparagraphs, provided however, that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industiral Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to Section 4 (a), (2), of Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has

determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

* * *

F. Field Board's Report

1. As promptly as possible after the proceeding and after full consideration of the record and of any arguments made or briefs submitted, the Field Board shall prepare a report which shall include a recommended decision in the case, prepared in accordance with the standard and criteria set forth in paragraph III. The Field Board's report shall contain a recitation of the questions presented, a summary of the evidence received, findings of fact with respect to each allegation made, and its conclusion on each question presented for consideration. The Field Board's report shall be forwarded through the Director to the Central Industrial Personnel Access Authorization Board. The report shall not be made available to the applicant.

2. Whenever an applicant has made a personal appearance before a Field Board, a decision adverse to him may be made only on grounds stated in the Statement of Reasons and any amendments thereto and must be based upon a record that is in conformity with Executive Order 10865 and this Regulation. A Field Board or the Central Board may not receive or consider any information

with respect to any fact in issue, unless such information is made available to such Board in accordance with this Regulation.

3. In every case where applicable, the Field Board shall give appropriate consideration to the fact that the applicant did not have the opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information. It shall also give appropriate consideration to whether information was given under oath or affirmation, and whether or not the person concerned has had an opportunity to rebut it. In every case where classified physical evidence is involved, information as to the authenticity and accuracy of said physical evidence furnished by the investigative agency shall be considered.

G. Action by the Central Industrial Personnel Access Authorization Board

* * *

3. Before the Central Board makes a final decision, it shall take the following action, as applicable:

a. If the Board reaches a tentative decision adverse to the applicant, it shall, through the Director, give notice thereof to the applicant together with notice of its proposed findings for or against him with respect to each allegation in the Statement of Reasons, and shall provide him with an opportunity to make an appearance before it, in person or by counsel, or to file a written brief. Within ten (10) calendar days after his receipt of such notice, the applicant may file with the Board a written notice of intention to appear or to file a written brief. If the applicant files such written notice of intention, the Board shall fix as early a date as practicable for filing a written brief or making a personal appearance before it, and through the Director, shall give notice thereof to both the applicant and department counsel with copies of the tentative decision and proposed findings as previously furnished to the applicant.

* * *

Procedure after final determinations

1. Final determinations reached by the Central Board shall be announced by the Director who shall notify the applicant of the determination in his case. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified of (1) the final conclusion reached, and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

2. Final determinations reached by the Secretary of Defense or the Administrator concerned shall be announced by the Director. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified only of (1) the final conclusion reached and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

3. Determinations of the Central Board shall be final subject only to:

   a. Reconsideration on its own motion, or at the request of the applicant, addressed through the Director, after it has made a finding that there is newly discovered evidence or that other good cause has been shown;

   b. Reconsideration by the Central Board at the request of the Secretary of Defense, the Secretary of any military department, the Director, or when appropriate, the Administrator concerned.

   c. Reversal by the Secretary of Defense or in agency cases reversal by the Administrator concerned after consultation with the Secretary of Defense.

* * *

K. Authority of the Secretary of Defense, and the Administrators, Federal Aviation Agency & National Aeronautics and Space Administration

Nothing contained in this Regulation shall be deemed to limit or affect the responsibility and powers of the Secretary of Defense or of any Administrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when he personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

* * *

APPENDIX II

LAW OFFICES OF
WRIGHT, WRIGHT, GOLDWATER AND MACK
Suite 502 Rowan Building
458 South Spring Street
Los Angeles, California 90013
Telephone 626-1291

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February 6, 1964

Director
Office of Industrial Personnel
Access Authorization Review
Pentagon
Washington, D. C.

Attention: Mr. John Davis or Mr. Roland Morrow

Re: NAME: REMENYI, Joseph Julius
DOB: February 16, 1904
POB: Zips-Neudorf, Czechoslovakia
CASE NO: OSD 60-72

Gentlemen:

We have not received any official notification of the hearing date. We discussed this matter with Mr. Curtis February 6, 1964, and he advised that the hearing will start February 13, 1964, at 1409 Wilshire Boulevard, Santa Monica, California. I further understand that the testimony of the government witness will be taken at 1:30 p. m. Wednesday, February 12th at the same address.

We have agreed that we will not object to the manner in which the evidence from the particular government witness is presented. We understand that this particular witness wants his identity to remain secret. He has agreed that Mr. Loyd Wright may participate in his examination and cross-examination on behalf of our client, Joseph Remenyi. Mr. Wright is to give his undertaking that he will not divulge the identity of the witness. We have requested that the undersigned be permitted to participate in the examination and cross-examination upon giving the same undertaking. You have advised the witness had not agreed but that you would request once again that I be permitted to participate in his examination and cross-examination. You will not object in the event Mr. Wright requests that the testimony of the witness be interrupted prior to cross-examination so that he may have an opportunity to confer with our client for a reasonable period of time. Please advise of the form of the undertaking you request from Mr. Wright or from

me in the event I am allowed to participate.

It is our understanding that you will furnish us with copies of any written statements made concerning our client by any government witnesses. We would particularly like to receive a copy of any statement made by the witness whose testimony is to be taken February 12th as soon as possible.

It is our present intention to present the testimony of six witnesses. Since we do not know what your evidence will include, we cannot be more definite.

The Statement of Reasons issued in this matter at Paragraph 2(c) lists certain items of documentary evidence. We would like an opportunity to inspect those documents or copies as soon as possible. We also request the inspection of any other documentary evidence you intend to produce at the hearing.

Very truly yours,

(signed) Andrew J. Davis, Jr.,
Andrew J. Davis, Jr., for
WRIGHT, WRIGHT, GOLDWATER
and MACK

AJD:sa

cc: Dr. Joseph Remenyi

In the Matter of	)	C
	)	O
	) OSD 60-72	P
Joseph Julius Remenyi,	)	Y
	) STIPULATION	
Applicant	)	
	)	

It is hereby stipulated by and between the Applicant, Joseph J. Remenyi, Andrew J. Davis, Jr., Esq., counsel for the applicant, and John Davis, Esq., counsel for the Department of Defense, that:

The Department of Defense has made available for detailed examination by applicant's counsel, a witness, who, for the period from 1946 to April 1949, was an official of the Czech Embassy in Vienna. To facilitate the examination of this witness, the Department of Defense has made available to counsel for the applicant contemporaneous reports made by this witness to the U. S. Government and other statements made by him to investigative agencies since his arrival in the United States in 1949. The Department of Defense has also made available certain other information which bears upon the reliability of this witness' testimony.

From about February 1948, when the Communist Party in Czechoslovakia took control of the Government, until April 1949, the witness was engaged in intelligence work for the U.S. Government. In the course of this work, he was in a position to obtain certain information which, in order to protect his identity and the interests of the U. S. Government, is set forth as conclusions and not in detail in the summary of his testimony contained in this stipulation.

U. S. Government records reflect that this witness' information was characterized as "fairly reliable" at one time, and at a

later date of "extraordinary value and sensitivity" and as "he was considered a reliable informant".

SUMMARY

If the above witness were called he would testify as follows:

1. During all the relevant period until April 1949, the witness was employed as an official of the Czech Embassy in Vienna.

2. He met the applicant in his official capacity when the applicant applied for travel documents in 1946 at which time he was referred by the witness to Wilhelm Karas, the Security Officer of the Embassy. The witness had further official dealings with the applicant in 1947, when the applicant applied for a Czech passport and the witness again referred him to Wilhelm Karas. During the entire relevant period, Wilhelm Karas in addition to his ostensible official duties as Legation Secretary was also Chief of the Czech Intelligence Service for Austria. In gathering information he made trips to the French and American Zones of Austria, contacting sources of information and utilizing the witness' official duties as a cover for his intelligence activities. Subsequent to February 1948, when the Communist Party of Czechoslovakia took control of Czechoslovakia, Karas continued to function in the duel capacity described above.

3. In February 1948 the witness determined to defect to the West, and approached an official of the U. S. Government for this purpose. He was asked by this official to continue as an official of

the Czech Embassy and to provide information to the U. S. Government. He did continue in this capacity and did provide such information until April 1949 when it became too dangerous for him to remain. During this period as information came to his attention, the witness made periodic reports to agents of the U.S. Government about many matters of interest to the U. S. Government, including two which referred to or dealt with the applicant.

4. In the Spring of 1948, Karas accompanied the witness to Innsbruck in the French Zone of Austria. There Karas made an excuse to separate from the witness, who then followed Karas and observed him meet the applicant in front of a downtown cafe. The witness observed them in animated conversation for a period of 10 to 15 minutes. He then left to avoid being seen by Karas. During the time he observed them together, he did not see any documents or money pass between them. Subsequently, the witness observed Karas and the applicant together at the Czech Embassy in Vienna at approximately monthly intervals through December 1948.

5. At no time did the witness see the applicant and Karas exchange any documents or money, and he was not in a position at any time to overhear their conversation. The witness has no information that the applicant was a Communist, or any information concerning the nature of the applicant's relations with Karas.

(signed)
ANDRES J. DAVIS, JR., Esq.
Counsel for Applicant

(signed)
JOHN DAVIS, Esq.
Counsel for Department of Defense